IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 48

UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Administratrix of the Estate BURSE PHILLIPS, Deceased, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION, AMICUS CURIAE

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STATEMENT OF FACTS

This brief, Amicus Curiae, is addressed to the writ of certiorari granted by this Court (R. 1769) to review the judgment of the United States Court of Appeals for the Sixth Circuit, reported at 325 F. 2d 804 (December 18, 1963), which affirmed the judgment of the United States District Court for the Eastern District of Tennessee, Northern District (R. 85a) in overruling motions of Petitioner for a new trial or for judgment n.o.v. The jury returned an adverse verdict to Petitioner in this private antitrust suit,

finding that the Petitioner had engaged in a combination or conspiracy so as unreasonably to restrain trade, or monopolize or attempt to monopolize commerce among several states in violation of Sections 1 and 2 of the Sherman Act. Although the respondents named only the United Mine Workers of America and the Trustees of the Welfare Fund in their cross-complaint as parties, they named several coal operators as co-conspirators whom they claimed had conspired with the Union to drive them out of business.

In connection with this writ of certiorari petitioner, UMWA, raises several grounds, procedural and substantive, to gain a reversal of the judgment below.

The Interest of the Amicus Curiae

BCOA's sole interest in this case is in the preservation of the legality and integrity of the National Bituminous Coal Wage Agreement and the bargaining structures in which BCOA plays a part, for the effective and peaceful settlement of labor disputes in the bituminous coal industry. The National Bituminous Coal Wage Agreement, negotiated by BCOA on behalf of its members, and the established mechanisms for negotiating and amending that agreement were introduced as evidence in the trial of this case.

BCOA does not have any interest in other aspects of this case, such as, for example, evidence relating to alleged incidents of local violence and labor strife, financial relationships between the UMWA and certain coal companies, competition for the TVA market, and the like. Since BCOA is in no way involved in these issues we do not as an *amicus curiae* take a position in respect to them or as to their effect, if any, on the judgment of the court below.

BCOA and Bargaining

BCOA was formed in 1950 as an unincorporated association. Its objects, insofar as they are pertinent to this proceeding, are stated in its "Agreement and Articles of Association" to be:

> "to promote stable, just and harmonious industrial relations between its members and their employees; to negotiate, from time to time, basic agreements for its members covering wages, hours, and conditions of employment and to enter into such agreements on behalf of such members with the representatives of the International Union of United Mine Workers of America . . .; to aid in the enforcement of such agreements at top levels between the members of the Association and their employees; to secure the faithful observance by its members of all such agreements . . .".

Although the total membership varies from time to time because exit from and entrance to BCOA is a fluid matter, there are presently approximately 63 bituminous coal operators represented in BCOA either directly as a sustaining member or indirectly through an associate member.[1]

The method of negotiating a contract or changes in a contract with the petitioner UMWA is not rigidly prescribed in the Agreement and Articles of Association of BCOA. The reason for this is to promote a

[1] It should be noted that by no means all of BCOA's members are so-called "large operators". BCOA had fourteen members, who in 1958, produced less than 30,000 tons, five members who produced between 30,000 and 50,000 tons, and eight members who produced between 50,000 and 100,000 tons. Thus there were twenty-seven members who could clearly be classed as small operators. As a point of reference, Phillips Brothers' tonnage in 1955 was approximately 34,000 tons.

flexibility of approach to each new effort at negotiations. Since each negotiation has different characteristics, many of the procedures utilized, such as the appointment of study committees and the like, are *ad hoc* and vary each time negotiations are entered into.

Article II of the "Agreement and Articles of Association" states that the Association shall "enter into such agreements *on behalf of such members*" with the UMWA. The agreements referred to are collective bargaining agreements with the UMWA and the members referred to are members of BCOA. Any member of BCOA which is not in agreement with the contract may refuse to authorize execution on its behalf. BCOA mails the contract or amendment to its members with an explanatory covering letter. Even after such bargaining is completed, individual members may refuse to authorize the contract's execution on their behalf. Nor does BCOA represent all or anything approaching a majority of bituminous coal mine operators. There are other collective bargaining associations in the coal industry, including regional and state associations as well as many operators who are unaffiliated.

I.

IMPLICATIONS OF THE PROCEEDINGS BELOW TO THE FUTURE OF COLLECTIVE BARGAINING IN THE COAL INDUSTRY

Respondents claim that the Bituminous Coal Wage Agreement as amended and the negotiations surrounding the execution of that agreement and amendments were used in the alleged conspiracy. Thus counsel for respondents in his closing argument to the jury in the District Court stated:

> "Now the instrument (of conspiracy) we say they decided to use was the 1950 Coal Wage Agreement . . ."
>
> * * *
>
> So somewhere along the line, either before, during, or after, they got together on what they could do about it, and they said, 'We will use the 1950 agreement because that will put these little boys out of business, it is too expensive, they can't operate under this, we have got the wage scale.'" Tr. 3309-10.

In summarizing the respondents' contentions in his instructions to the jury, the trial judge clearly outlined the respondents' indictment of the method of bargaining in the coal industry subsequent to 1950 and the integrity of the Bituminous Coal Wage Agreement. The trial judge referred specifically to appellees' evidence of a "marked change (which) occurred in the relations between the Union and the major coal companies in 1950," (R. 1538a) and further referred to respondents' contention

> "That the conspiracy involved the use of the National Bituminous Coal Wage Agreement and its successive amendments as an instrument in accomplishing the purposes of the conspiracy." (R. 1539a)

Again:

> "That a central part of the agreement among the illegal conspirators was that the terms of the National Bituminous Coal Wage Agreement would be imposed upon the smaller and financially weaker coal companies with the knowledge and intent that these companies in large numbers would go out of business because they could not afford to pay the increasingly higher prices and welfare

> royalties which were designed to meet the abilities of the large combines to pay as the mechanization programs of the large companies progressed." (R. 1542a)

There was, in fact, no evidence presented of the existence of any "agreement" or understanding of this kind. However, among the matters relating to the National Agreement and bargaining mechanisms which were stressed by respondents in the whole complex of circumstances which respondents were permitted to put before the jury were the following:

1. General labor peace in the industry since 1950 as compared to incessant conflict, strikes, and labor unrest prior thereto.

2. Increase in wage levels and welfare payments as the result of collective bargaining since 1950.

3. Failure of the Union to effectively oppose mechanization which increased employee productivity in the mines.

These matters are all of direct concern to BCOA and its members because they are generally the product of collective bargaining and relate to the so-called National Agreement which BCOA negotiates with the Union. They are also clearly on their face the normal consequences of the system of collective bargaining which is endorsed and encouraged by the National Labor Relations Act.

The opinion of the Court of Appeals, by its recitation of the history of wage agreements between UMWA and coal operators from 1945 through 1958, and its description of some of the terms and conditions of such agreements (325 F. 2d at 812-813), has lent color

to the respondents' contentions below that the National Agreement has been used as an essential instrument of an otherwise unproven conspiracy between UMWA and certain coal operators in violation of the Sherman Act.

BCOA filed an *Amicus* brief with the Court of Appeals calling attention, as we do here, to the adverse impact on established bargaining structures in the coal industry, and other industries as well, of a jury verdict of violation of the anti-trust laws which relied so heavily upon the bargaining relationships in the industry and their consequences, chiefly the periodic wage increases negotiated with the Union and the relative labor peace which has existed since 1950.

The Court of Appeals in its 24-page opinion ignored what BCOA believes is a basic issue in this case, and made no reference to the question, regarded as vital by BCOA, that is to say, whether an illegal conspiracy may be inferred (without actual evidence of its existence) from the fact that BCOA and other associations representing coal operators in the industry entered into collective bargaining agreements over the years which provided for increased wages and benefits to miners, which, presumably, exceeded the financial ability of some operators to pay—thus resulting in some marginal operators being forced to go out of business.

The Court of Appeals, without expressly saying so, appears to have felt that a gradually increasing wage cost, resulting from established bargaining relationships, was properly considered by the jury as evidence of an unlawful conspiracy. Thus, the Court recites at length in its opinion the history of negotiations in the industry, and ruled that this evidence was properly received and submitted to the jury. Ironically, during

the period from 1945 through 1958 when these increased wage and welfare costs occurred, there were five Government seizures and much of the advance in wages and welfare payment were the direct result of Government action during the periods of Government seizures.

The Court of Appeals, as did the District Court, appears to have accepted the theory that negotiated wage and welfare increases in excess of the assumed ability of some marginal operators to pay may be presented to the jury as evidence of an unlawful conspiracy. The District Court and the Court of Appeals adopted the same view with respect to increases in the minimum wages prevailing under the Walsh-Healey Act. This evidence, together with wholly unrelated evidence as to Union violence, the alleged activity of one coal operator in dumping coal on the TVA market, and the acquisition by the Union of stock in one coal company and its subsidiary, composed the essential ingredients of the evidence from which the jury was allowed to find a conspiracy on the part of the Union and "certain large producers" to drive small producers like Phillips out of the market.

The far-reaching implications of such an approach to the anti-trust laws as applied to the labor field are readily apparent. What is cast into doubt by the Court of Appeals decision is whether the normal consequences of established bargaining relationships in a particular industry can be subjected to collateral attack under the anti-trust laws.

The comparative labor peace in the coal industry which has come about in the last decade has been applauded by labor relations experts and Government officials and is indeed the ultimate objective of our

National Labor Policy as expressed in the National Labor Relations Act. The preamble to that statute states in part:

> "Is is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . ." 29 U.S.C. Section 151.

Thus collective bargaining is made mandatory by law and enforced by the NLRB and the Courts. Indeed, the record in this very case shows that the critical bargaining leading to the 1950 agreement here under attack was conducted pursuant to a mandatory court injunction against both the union and the operator parties. The ultimate objective of our National Labor Policy is to bring about the peaceful settlement of labor disputes and the elimination of strikes, a policy that has found some success in the coal industry since 1950.

Increased wages and benefits and better working conditions are the primary and traditional goals of labor unions, and their right to pursue these goals through collective bargaining is fully recognized and implemented by law. The UMWA is by no means unique in its devotion to these objectives or in its success in attaining them during the past ten years, just as they pursued and attained with equal success substantial wage and other concessions in the decade preceding 1950. The wage increases and fringe benefits granted in the bituminous coal industry as the result of collective bargaining since 1950 have been no

greater than wages and fringes granted in other basic industries over the same period.[2]

Here again, however, the increases in wage rates and welfare royalty payments achieved by the Union since 1950 are admitted in evidence and presented to the jury as another circumstance from which they are permitted to infer the existence of a gigantic conspiracy on a national scale.

Likewise, with respect to mechanization and increased productivity of the individual coal miner, the trial judge, with the approval of the Court of Appeals, permitted evidence of mechanization and increased productivity in the industry to go to the jury, and has permitted adverse inferences to be drawn from the Union's acquiescence in mechanization.

There is no question that the coal operators have attempted, with some success, to mechanize their mines and to increase the productivity of the individual miner. In doing this, they were motivated by normal, prudent business considerations of controlling costs

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[2] Based on published statistics of the Department of Labor, Bureau of Labor Statistics, the average weekly earnings of bituminous coal miners in 1950 and 1960, compared with three other basic industries were as follows:

Industry	1950 Average Weekly Earnings	1960 Average Weekly Earnings
Bituminous Coal	$67.46	$112.77
Petroleum Refining	$75.11	$118.78
Blast Furnace, steel works & rolling mills	$67.95	$116.13
Automobiles	$74.85	$115.21

and enhancing their ability, at best precarious, to compete with other fuels.[3]

These mechanization programs started long before 1950 and they are continuing and will continue in the future under the compulsion of economic necessity. How and in what manner the Union could have impeded these efforts, had it sought to do so, remains unexplained. The inference that the Union's acceptance of mechanization may be considered as evidence of a conspiracy is totally unwarranted. The fact again is that modernization and mechanization are necessities of our times and our industrial system. The same process is going on in all of our major industries and is a key factor in our ability to compete in a world market. The remarkable progress which the coal industry has made in holding down costs of production against the inflationary thrust of rising labor and material costs has received general acclaim.[4] Like all other unions, the UMWA has pressed the operators to obtain a share in this increased productivity in the form of increased wages and benefits for its members. All this is entirely

[3] Official Government statistics show the declining percentage of bituminous coal production in relation to the total U. S. energy production as against the rising percentage of production of crude petroleum and natural gas.

Year	Bituminous Coal and Lignite	Anthracite	Crude Petroleum	Natural Gas, Wet	Waterpower
1900	70.5%	18.4%	4.7%	3.2%	3.2%
1930	55.4%	8%	23.5%	9.7%	3.4%
1950	39.2%	3.2%	33.2%	19.8%	4.6%
1960	26%	1.2%	35.7%	33%	4.1%

Source: Mineral Industry Surveys, United States Department of Interior, Bureau of Mines, September 1, 1961, Weekly Coal Report, No. 2294, Table 17, p. 24.

[4] See 84 Monthly Labor Review 1081 (1961).

consistent with traditional Union objectives as they are pursued in industry generally.

The intrinsic legality of the National Agreement should not require argument. When referring to negotiations and the collective bargaining agreement in his charge to the jury on the law to be applied, the trial judge instructed that multi-employer bargaining (R. 1563a), a single contract in the industry (R. 1556a), the increasing wage and welfare provisions (R. 1565a), and other provisions were all lawful contractual provisions as long as their existence was not pursuant to a combination or conspiracy to put small operators out of business.

Although some potential protection to the current patterns of bargaining in the industry and to the integrity of the agreement is found in the opening portions of the judge's instructions on these matters, it is a matter of grave concern to BCOA that the so-called National Agreement, its method of negotiation and its provisions, should have been intermingled in the evidence presented below and in the judge's charge with various other facts and circumstances, which are wholly unrelated and some of which, such as evidence of local labor violence, are inflammatory in character. The evidence presented as to local violence, the financial relationship between UMWA and certain coal companies, not members of BCOA, the competition for the TVA market, the policies and goals of the UMWA as a labor organization, and other circumstances introduced in evidence, are entirely outside the province of BCOA and are in no remote way connected up with the National Bituminous Coal Agreement, its provisions, or the bargaining procedures which are utilized to negotiate and amend it. Yet, these unrelated circum-

stances have been used to lend color to the bald and unsupported assertion by respondents that the National Agreement, itself, was used as an instrument of the alleged conspiracy.

The only thread apparent from the record to tie together these widely variant and unrelated circumstances is the constant reiteration by the respondents that all of the circumstances—separated as they are by time, distance, nature, and motivation—were undertaken pursuant to a conspiracy national in scope and unlawful in purpose. Yet, there was no independent evidence submitted to show the existence in fact of such a conspiracy. Rather, the conspiracy was presumably inferred from these very circumstances which are concededly lawful.

We recognize the wide latitude permitted in anti-trust cases for the submission of evidence from which reasonable inferences can be drawn. However, if the existence of an unlawful conspiracy under the Sherman Act can be inferred from the normal and traditional relationships between management and labor negotiation and maintenance of labor agreements in a particular industry, then the stability of labor relations in this and other industries has been seriously threatened.

The District Court, with the approval of the Court of Appeals, erred in failing to instruct the jury that the circumstances relating to the National Agreement, and the bargaining processes which produced it, were lawful circumstances which could not be used as evidence from which unfavorable inferences could properly be drawn in an anti-trust suit. By the District Court's inclusion of these matters in his charge to the jury, the jury was handed here a whole multitude of unrelated and disssimilar facts and circumstances,

ranging from incidents of local violence in Tennessee to the National Bituminous Coal Wage Agreement itself, and told, in effect, that from all or any combination of these facts and circumstances the jury could infer that a conspiracy exists. The decision and opinion of the Court of Appeals affirming the District Court's judgment fails to rectify this error.

All that the jury verdict tells us is that the jury believed that the UMWA had engaged in a conspiracy. We do not know who the jury believed to be the other party or parties to such a conspiracy, nor do we know its nature or scope Yet, it is clear from the wide range of admitted evidence, and from the instructions given by the trial judge that in that determination the jury was given a multiple choice of possible parties and possible conspiracies and possible circumstances on which to base a verdict.

The very ambiguity of the jury verdict, when meas-used against the wide choice of conspirators and conspiracies left open to it by the District Court, has shocking and far-reaching implications. If allowed to stand, it creates a cloud of suspicion over the entire bituminous coal industry and over the collective bargaining procedures and agreements which govern its labor relations on a national scale. It puts into question any form of association or multi-employer bargaining which is a characteristic of many of our major industries as well as coal. The repercussions could have an unstabilizing effect on labor peace not only in the coal industry but in many other industries as well.

It is submitted that the District Court failed to perceive and to instruct the jury on certain important features of this case which distinguish it from the

ordinary anti-trust suit. To be sure, it noted the immunity given labor organizations from anti-trust actions unless they conspire with employer groups. But the District Court did not, as we think it was required to do, instruct the jury that evidence of a conspiracy with employer groups could not be found in a collective bargaining agreement, lawful on its face; or in the lawfully established procedures for negotiating and amending that Agreement. It is further suggested that the District Court should have instructed the jury that no inference of an unlawful conspiracy could be drawn from the results which have flown from the arm's-length collective bargaining which has taken place under compulsion of law, such as increases in wage rates and employee benefits for members of the union over the years. These are the normal and expected consequences of our system of free collective bargaining, under the aegis of the NLRB and the courts, as the history of industry generally throughout the last 25 years will attest.

The failure of the District Court to differentiate and insulate the normal processes and consequences of collective bargaining from attack under the anti-trust laws will, if allowed to stand, create a basic inconsistency between the anti-trust laws and the labor laws which foster and enforce the very processes and procedures here under attack. This is strongly analogous to the apparent inconsistency between the Sherman Act and the Norris-LaGuardia Act which the Supreme Court clarified in the *Hutcheson* case[5] by giving precedence to the policy expressed in the labor statute. The decision and opinion of the Court of Appeals, by its mere repetition of the evidence introduced by respond-

[5] United States v. Hutcheson, 312 U.S. 219 (1941).

cuts, failed to perceive and, indeed, perpetuated the errors of the District Court.

By characterizing respondents' evidence as "background . . . given to the jury" (325 F. 2d at 811) and concluding that such background constituted substantial evidence to uphold the jury's verdict, the Court of Appeals has endorsed the same blank check given to the jury in this case by the District Court.

BCOA cannot ignore this direct attack on the integrity of the agreement it has helped to negotiate and the procedures it has used to bargain. The labor agreement in this industry which has been negotiated and maintained over the last two decades has brought a measure of labor peace and has helped to insure the uninterrupted production of a commodity—coal—which is essential to our economy. The jury verdict and the decision of the Court of Appeals leaves the bituminous coal wage agreement itself, the parties who negotiated it and who are signatories to it in an exposed and hazardous legal position.

II.

BARGAINING CHAOS IN THE COAL INDUSTRY PRIOR TO THE FORMATION OF BCOA

A brief review of bargaining in the coal industry prior to 1950, as disclosed in this record, should cause sober reflection to those who would indict the post-1950 agreement and bargaining on such sweeping charges.

It is matter of history that from 1930 to 1950 bargaining in the coal industry was highlighted by bitter and protracted "klieg light" negotiations between large numbers of the union's committee and even larger numbers of employers. Costly strikes impairing the national interest were a recurring symptom and govern-

ment seizure of the mines became an ordinary, not extraordinary remedy. NLRB charges and countercharges were frequently exchanged and lawsuits resulting from bargaining differences were on court dockets continuously. The only way to describe such bargaining in the 30's and 40's is to say that it was chaotic and costly to the industry and the public at large. This period of history was characterized by national strikes, injunctions, Government seizures, and almost total disruption.

During these years the bargaining for a contract generally became focused on a similar date for most of the operators. Three distinct employer groups emerged in these national negotiations—the Northern operators, the Southern operators and the so-called "captive mine" operators (operators who mine coal for use in the processing of another product, mainly steel). These broad lines of division between the employer groups made for disorganized bargaining on the employer side, and provided opportunity for the union to exploit the organizational weaknesses of the employers. With each new effort at negotiations the operators would attempt to form a committee with various subcommittees to receive and present bargaining proposals. There was, however, no continuing organization to attempt to maintain peaceful and stable labor relations. The amorphous and *ad hoc* nature of the employers' bargaining organization made serious, good faith and business-like bargaining difficult, if not impossible, on both sides of the bargaining table.

Given the organizational disarray of the employers and the increasing strength of the union through the National Recovery Act with its Coal Code in 1933, the Guffey Act in 1935, and the Bituminous Coal Act of

1937, and the second Guffey-Act of 1939, the results were not surprising. In 1934, 400,000 miners struck for one week after which the operators agreed to a wage rate of $5.50 a day in the North and $5.10 in the South. In 1939, the union demanded a wage increase, a 30 hour week, paid vacations, seniority rights, improved hospitalization, federal inspection of mines and a protective clause. Negotiations broke down. The miners struck for five weeks and returned only after Presidential intervention. In 1941, the Southern miners struck Southern operators after the operators withdrew from negotiations in which the union was seeking to eliminate the regional wage differential. Shortly thereafter miners of the captive mines struck. One hundred thousand other miners struck in sympathy with the strike of the captive mine employees. During the 1943 negotiations there were a number of strikes over a six month period and the government seized the mines twice. Similarly in 1945 a number of strikes following a breakdown of negotiations resulted in government seizure of 235 mines.

When the government seized the mines once again in 1946 because of a breakdown in negotiations over a welfare fund, a settlement was reached only by means of negotiating a collective bargaining agreement with the then Secretary of Interior who agreed to the welfare fund.

The succeeding contracts in 1951, 1952, 1955, 1956, 1958 and 1964 have been in form of amendments to the 1950 agreement. BCOA has participated in the making of these amendments by negotiating with the Union on behalf of its own members, in the manner described above. BCOA's contribution has been to provide a continuing focal point for its operator members to

attempt to achieve peaceful and amicable settlements with the Union and to avoid crippling strikes. BCOA performs this function on behalf of its members only, but BCOA membership is open to any coal operator who wishes to participate in the negotiations through BCOA.

The results of the post-1950 method of negotiations are an open record. Collective bargaining has been, to a marked degree, stabilized in the industry. There have been no government seizures or crippling nationwide strikes since 1950. Collective bargaining problems have not ended as a matter of course in NLRB or court proceedings, or in Government seizure or other intervention.

The record will show, however, that the negotiations since 1950 have not been without real issues between the parties. Each new union demand has been carefully analyzed for its legality and its economic impact on the members of BCOA. Many demands have been opposed and few have been accepted without compromises. The issues are still the same; only the procedures by which the issues are resolved have been changed. They have gone from jungle-type economic warfare to the reasoned and rational processes of the conference table.

The thrust of respondents' argument with respect to the post-1950 negotiation of the National Bituminous Coal Wage Agreement appears to be that there is something sinister and unlawful in the fact that a group of coal operators have chosen to eschew individual company bargaining and conduct their contract negotiations with the Union through BCOA, an employer association established for that express pur-

pose. Respondents also seek to draw unfavorable inferences from the further fact that the post-1950 bargaining for amendments to the agreement has been characterized by peaceful settlements and by the absence of strikes, public bickering and legal controversies of the type which were prevalent in the pre-1950 era.

Respondents do not enlighten us as to how the coal operators should conduct these contract negotiations in such a way as to lift this cloud of suspicion from the contract negotiations. Presumably, however, this could require the abandonment by coal operators of association-type bargaining and force a reversion to the disorganized and dismally unsuccessful pattern of the past, where the weaknesses inherent in the lack of maturity and organization on the operator side were exposed and exploited by a strong and unified labor union.

Nor do respondents enlighten us as to how the coal operators, acting through their associations or otherwise, can roll back or unduly retard wage and welfare advances in this industry without regard to the aspirations of the miners for improvement and the general upward movement of wages and welfare in the economy at large.

An essential element of Respondents' case appears to be an attack on any form of Association or pattern bargaining. The right of individual employer units in the same industry to form an association to represent their common interests in collective bargaining has been sustained by the NLRB and the courts.

NLRB v. *Truck Drivers' Local Union*, 353 U.S. 87 (1957), *Alston Coal Co.*, 4 L.R.R.M. 337, 13 NLRB 683 (1939), *Stevens Coal Co.*, 19 NLRB, 98 (1940). The legality of association bargaining is therefore beyond question. The regulation of collective bargaining between employers and unions and the enforcement of the rule of good faith, arm's-length negotiating fall within the exclusive province of the NLRB. The NLRB has not prescribed that any particular formalities be followed in reopening and negotiating changes in collective bargaining agreements, nor has the Board even drawn any inferences of collusion or bad faith bargaining from the fact that the parties are able to resolve their disputes at the conference table rather than by resort to strikes or lockout to gain their ends. On the contrary, the national labor policy encourages and fosters the establishment of orderly bargaining procedures for the peaceful settlement of contract disputes.

It is inconceivable that bargaining procedures, which have the complete endorsement of our labor laws, should in any respect be questioned under the anti-trust statutes. The assumed fact, even if it were shown to exist, that there are marginal coal operators in the industry who cannot afford to pay the wages and benefits to their employees provided by the National Agreement provide no proper basis for an anti-trust violation. This is an unfortunate economic condition and a fact of life which exists in all industries, and in some perhaps to a greater extent than others. Unions, in presenting and pursuing their bargaining goals in a particular industry, are not required to, and normally do not, take into account the ability to pay of the financially weaker business units, but

traditionally center their aim on the larger and more stable enterprises in the industry. By the same token, the more stable employers have had little success in resisting union wage and other economic demands on the ground that less stable employer units cannot afford to meet union standards.

Yet, a major item of the alleged conspiracy is the contention that it is a violation of the anti-trust laws for one group of employers to agree to wages and conditions which another group in the same industry may not be able to meet. This concept would again cast reflection upon the patterns of bargaining and their consequences in all of our major industries.

CONCLUSION

BCOA submits that the policies of the anti-trust laws would not be furthered by returning the status of bargaining in this industry to the condition it was in prior to 1950. Unless this Court rectifies the error of the Court below there will be, of necessity, a weakening of support for the bargaining relationship and mechanisms which have been developed after years of crisis and which show promise for a sustained period of labor peace under law.

This error of the Courts below lies in abdicating their responsibility to clearly delineate the admissible evidence which may be submitted to a jury from which an inference of illegal conspiracy can be drawn. While the trial court appears generally to have enunciated the correct principles of law applicable to the case, the Court failed to observe these principles when it permitted the jury to draw an inference of illegality from the normal and traditional functioning of the collective bargaining procedures which have the support and

sanction of Federal law. This created a situation in which, for all that can be known, the jury could have based its finding of an unlawful conspiracy solely on the spurious contentions made by Respondents and accepted by the courts below that the National Agreement, the manner of its negotiation, and its economic consequences *vis-à-vis* the small operator constituted a conspiracy in restraint of trade. The granting of such wide latitude to a jury, inflamed by extraneous evidence of labor violence, will inevitably project the anti-trust prohibitions into areas of labor-management relations which are extensively governed by and in basic conflict with the National Labor Relations Act.

It is therefore, urged that the opinion and judgment of this Court vindicate the integrity of the National Agreement and the methods used to negotiate it by holding that they are not relevant or probative evidence from which a conspiracy may be inferred.

Respectfully submitted,

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